

FILED

Matkin v. Henry; No. 04-16784

DEC 22 2005

THOMAS, Circuit Judge, concurring in part and dissenting in part:

CATHY A. CATTERSON, CLERK
U.S. COURT OF APPEALS

I agree that Matkin's claim is not procedurally barred. However, I would hold that the California Court of Appeal's denial of her habeas corpus petition was an objectively unreasonable application of United States Supreme Court precedent because the *Allen* charge given in this case was not counterbalanced by an instruction "remind[ing] jurors of their duty and obligation not to surrender conscientiously held beliefs simply to secure a verdict for either party." *United States v. Mason*, 658 F.2d 1263, 1268 (9th Cir. 1981).